Department of Labor and Industry
Board of Personnel Appeals
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NOS. 3-2013 and 5-2013 and 6-2013

MONTANA PUBLIC EMPLOYEES ASSOCIATION, Complainant, -vs- CITY OF WHITEFISH, WHITEFISH POLICE DEPARTMENT, Defendant.	)	INVESTIGATIVE REPORT AND NOTICE OF INTENT TO DISMISS

I. Introduction

On August 3, 2012, the Montana Public Employees Association, hereinafter MPEA, through its Field Representative, Bob Chatriand, filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the City of Whitefish, hereinafter the City, violated the law in terms of how it has treated members of the Whitefish Police Protective Association (WPPA) and its president, Brandon Thornburg subsequent to their affiliation with MPEA. The charge specifies that the officers, and President Thornburg in particular, "have been experiencing escalating violations of 39-31-201 MCA." The charge further asserts that the violations "include personal disparaging remarks and actions as well as acts of intimidation, coercion and interference," a violation of 39-31-401 MCA.

On August 13, 2012, the MPEA filed a second charge alleging that the City had violated Sections 39-31-401(4) and (5) by "violating a 'status quo' agreement mentioned above, in retaliation to a prior filing of an Unfair Labor Practice Charge No. 3-2013 – (191-2013) filed August 1, 2012 over violations of MCA 39-31-401."

On August 28, 2012, the MPEA filed a third charge alleging that the WPPA President, Brandon Thornburg, "had been experiencing ongoing and continued violations of MCA 39-31-201, despite the filing of an Unfair Labor Practice charge for the same on August 1, 2012 . . . ." Specifically, the third charge alleged that President Thornburg had been placed under a corrective action plan as a result of alleged insubordination. The complaint goes on to assert that the actions of the City had been discussed with the City

Manager and even though that occurred, violations of MCA 39-31-401, 402, 403, 404, 405, 406, 407, 408, and 409 "continue and seem to be escalating." Further, as a result of the actions of the City "other officers who have similar experiences are reluctant to step forward with other Unfair Labor Practice incidents because of the unchecked and unabated treatment of their own WPPA president."

The City is represented in this matter by City Attorney Mary van Buskirk who has responded to all the charges denying that the City has violated any provisions of the collective bargaining act.

John Andrew was assigned by the Board to investigate the complaints. Because the complaints were filed in close proximity with one another and are a continuum of related allegations, they have been allowed to mature before review. Moreover, MPEA specifically requested the investigator meet in person with members of the bargaining unit. Because of other commitments in the Kalispell area, the investigator was able to meet with in person with members of the bargaining unit the evening of October 2, 2012. The members present indicated another member could be contacted at that time by phone if needed. Subsequent to this in person meeting MPEA requested an opportunity to respond to material submitted by the City in response to the third complaint. That was done with MPEA materials being submitted on October 19, 2012.

In addition to the above, the investigator requested that the parties advise him if there were any objections to the charges being consolidated in the event the recommendation of the investigator were similar on all three complaints. The City agreed to consolidation. Although MPEA did not specifically concur with consolidating the complaints, it did not object either. Since the recommendation of the investigator is the same for all three charges, and in the interest of administrative economy, the complaints are hereby consolidated.

It is also specifically noted that by e-mail of 10/12/12 MPEA withdrew ULP 5-2013. On that basis alone the complaint could therefore be dismissed, but since it is integral to the overall nature of the complaints in their entirety, the investigator will address it in this recommendation.

II. Findings and Discussion
ULP 3-2013

Before addressing the initial charge some additional background information is in order as it relates to all the complaints.

The Whitefish Police Department (WPD) bargaining unit consists of twelve employees. In the unit are detectives, patrol officers and sergeants. Excluded from the unit are the lieutenant, deputy chief of police and the chief of police. Although the Board of Personnel Appeals' automated records do not show Board certification of the WPPA, there is a long bargaining history between the WPPA and the City with the current agreement having expired on July 30, 2012. The parties are currently bargaining a

successor agreement. Negotiations are ongoing in an effort to reach a successor agreement.

On April 30, 2012, the MPEA filed a petition with Board of Personnel Appeals requesting the Board recognize affiliation of the WPPA with the MPEA. On May 1, 2012, Board agent Windy Knutson provided notice of the affiliation request to the City of Whitefish indicating interested parties could submit comment to the Board within 15 days. No comments were received and by letter of May 21, 2012, Ms. Knutson granted the request for the WPPA to affiliate with the MPEA. In the view of MPEA, this affiliation is at the heart of ULP 3-2013 and carries through the other complaints as well.

Before turning to the merits of ULP 2-2013, during the course of investigating this charge the investigator, as previously mentioned, has met with bargaining unit members. Two attended the evening meeting and were supportive of the charges that were filed and provided information in that vein. In addition to this, the investigator has been contacted by other members of the bargaining unit who have indicated they do not agree with the charges and allegations of their fellow bargaining unit members. In a unit where members have differing opinions as to the validity of the charges and the actions of management, it would add nothing of a productive nature to identify by name those contacted by the investigator, or those who contacted the investigator; so, they will be referred to as bargaining unit members only and not by name or title.

The specifics of ULP 3-2013 are outlined in notes kept by Brandon Thornburg which were forwarded to Bob Chatriand and appended to the charge filed by MPEA. At the core of the complaint is the allegation that the City was improperly recording conversations in the squad room.

The building in which the police department resides is newly constructed. Integral to the facility are high-tech communication systems, including one intended to record telephone conversations. There are actually three recording systems in the building, all installed for security and potential evidentiary purposes. Officers within the WPD have access to the recording systems through passwords. The fact that recording systems existed within the building was common knowledge. Specifically, it was common knowledge, reinforced by management, that recording systems existed and that recordings of phone conversations would occur. However, what was not intended in the system, nor initially known to everyone, was a problem commonly referred to as an open mic which was unknowingly built into the design of the phone system. Open mic meant, essentially, that even if a phone were hung up, the system continued to record. This problem was throughout the building and was not unique to the squad room, the room in which MPEA contends the improper recordings occurred that are the subject of this complaint. In short, this problem was not something unique to whatever union activities may or may have not occurred in the squad room, nor was the recording that occurred something instigated by management in any way to coerce, or otherwise interfere with union activities. It was a technical flaw in the recording system. The open mic situation was resolved, according to the vendor, as of September 27, 2011. As was stated by the vendor:

> "In summary the recording of non call on hook conversations was a technical issue not the intent of or normal use of the recording system installed. This issue was finally resolved on 9-27-11."

By virtue of this alone, it is readily apparent that any recording which may have occurred was not directed toward the WPPA or any of its activities. However, MPEA contends that the recording continued even after it supposedly was stopped. In fact, Union members have pursued action concerning the "illegal recording" beyond the context of the Board of Personnel Appeals with complaints lodged with the Flathead County Attorney as well as the Montana Attorney General's office. To the understanding of the investigator, neither the County Attorney or the Attorney General have pursued the complaints and have indicated no action will be taken.

Independent actions aside, the investigator asked the MPEA, in written form, and in person, to explain the nexus between the recording and union activity. One example cited to the investigator concerned matters prior to the affiliation with MPEA. In another instance, the WPPA in order to protect the sanctity of its meeting because of fear of recording and/or fear for job security, met outside the squad room. According to the WPPA, discussion in this meeting found its way back to management. However, as even the bargaining unit members acknowledged, this could well have happened, not because of any recording, or lack of recording, but rather, because unit members may well have shared information with management on their own volition. Most importantly, nothing presented to the investigator indicates that the recording, which may or may not have even occurred, in any way related to protected activities. Even more compelling, and as the investigator determined, any recording which may have occurred could be accessed and is accessible to all members of the bargaining unit. The capability exists for any officer to listen to the recordings upon using the proper password access to the system. If management were secretly recording bargaining unit members for some unknown reason, why was it recording all over the building? Even more importantly, why would management provide access to the recordings to bargaining unit members? There is no demonstrated nexus between whatever recording occurred and protected union activities.

Also tied to the recording was the placement of a styrofoam cup on a ceiling panel. The cup was placed by Lieutenant Bridger Kelch. Written on the cup was "surreptitious listening device." The cup was placed by Lt. Kelch as a practical joke, obviously in hindsight, a practical joke gone bad. Brandon Thornburg noticed the cup and took particular offense to it given how seriously many in the bargaining unit viewed the recording issue. When Officer Thornburg confronted Chief Dial about the cup, Chief Dial said to take it down. Officer Thornburg did that, retaining it, as well as a listening device he found in the squad room. He also kept a feminine hygiene product left in his mail box, both of which MPEA contends evidence further harassment, intimidation and coercion of President Thornburg.

Concerning the styrofoam cup and other incidents in the initial ULP charge, there is an old adage that it takes two to tango. Brandon Thornburg, even as recognized by MPEA,

had a reputation as a practical joker – the "life of the party." The placement of the styrofoam cup was not something done to intimidate or coerce Officer Thornburg or anyone for that matter, either related to union activities or otherwise. It was behavior not atypical to a working environment, and certainly not atypical to the Whitefish Police Department from all the investigator can garner. Sadly, and in perfect 20/20 hindsight the same can be said of the incident with the feminine hygiene product. That too was part of the pattern of the workplace, and of particular note, that incident was initiated by a fellow bargaining unit member – not by any management official. The same can be said of the disputed comment attributed to Chief Dial and directed to Officer Zebro. Even assuming it were made as alleged, it was not out of the ordinary in the workplace. Finally, concerning any audio or visual recording devices present in the squad room, that room was commonly used by all the department, and it was not unusual for such devices to be present as a regular part of work routine. The foam covered mic in particular that was brought to the attention of the investigator as part of this case is about the size of a ping pong ball. It was not unusual for such devices to move in and out of the squad room in the normal course of business. Nothing demonstrates it was there for some purpose to intimidate, coerce or interfere with Union business or Union membership.

Considering the totality of accusations brought in this initial charge there are explanations, and plausible ones, offered by the City to rebut all the allegations. Other than the timing of the incidents occuring after affiliation there simply is no substantial evidence offered to sustain a finding of probable merit.

ULP 5-2013

As previously mentioned, this charge has been withdrawn by the Union. The charge is two pronged with the first being that the City violated the status quo when it failed to implement a provision of the contract providing a uniform cleaning allowance. Normally the Board does not interpret contractual provisions and would defer questions of this nature to the grievance procedure, but in the instant case the contract is expired. Further, even if the contract were not expired, it does not contain a final and binding arbitration provision making deferral questionable. Additionally, deferral is questionable given that this matter concerns police officers, and a clearly economic issue – uniform cleaning allowance. Deferral might be appropriate under 39-31-501 et seq. MCA, the interest arbitration act for police officers. However, overriding these considerations, since there is an allegation of retaliation based on the filing of a previous complaint, it is appropriate for the Board to consider the contract language in the context of the retaliation allegation. It is also appropriate for the investigator to consider this element of alleged retaliation as part of the overall nature of the charges brought by MPEA.

The contract language in question – Article G – provides a cleaning allowance of $225 for full time officers, the Animal Warden/Parking Officer and detectives. Full time dispatchers are to receive $175 per year. The agreement specifically provides:

Payments will be made to each Association member on 31 July of each year of the agreement.

It is in this context that the City recites the bargaining history in negotiating a successor agreement up to and including the date ULP 5-2013 was filed. None of the bargaining history was disputed by MPEA, nor is there anything contained in that history that demonstrates bad faith on the part of the City. The City and the Union simply disagree on the meaning of the language in the contract. In the view of the investigator, and while still recognizing he is not privy to the bargaining history leading to the language cited above, the interpretation of status quo by the City is not unreasonable any more than is MPEA's interpretation. In short, there was no retaliation demonstrated but instead there was an honest disagreement, one now resolved at the table in the course of bargaining. Had this complaint not been withdrawn the investigator would have recommended the matter be dismissed as without merit and/or the matter would have been deferred to the statutory process for police departments.

ULP 6-2013

This charge reiterates the contention that since affiliation with MPEA the president of the WPPA has experienced, and continues to experience, "ongoing violations of MCA 39-31-201." Specific to this charge is the assertion that the president, in direct relation to his union activities, was accused of insubordination and placed under a corrective action plan. The charge offers that "other officers who have similar experiences are reluctant to step forward with other Unfair Labor Practice incidents because of the unchecked and unabated treatment of their own WPPA president."

The role of the Board of Personnel Appeals is not to decide disciplinary matters. Normally such matters proceed through the grievance procedure up to and including final and binding arbitration. In the vast majority of cases, the Board would defer allegations of insubordination and corrective action plans to the grievance procedure. That is not possible in this case. First, there are the allegations of interference, retaliation, coercion etc. Issues of this nature can be properly before the Board, but the Board could also defer to the grievance for resolution of overall grievance. However, in the instant case, the City and the Union do not have final and binding arbitration in their current collective bargaining agreement. Therefore, deferral is not appropriate. The charge and its elements are appropriately before the investigator.

As previously found the investigator did not find substantial evidence to warrant a hearing on the merits of the first unfair labor practice charge. Evidence was similarly lacking in the second charge, and as also indicated, the second charge was withdrawn, seemingly in its entirety. Concerning the third charge, the investigator in his initial meeting with the union members who attended was provided a series of documents relating to the third charge. Included were incomplete and unsigned evaluations of Officer Thornburg. In response to the information provided by the WPPA, the investigator also requested Officer Thornburg's personnel file, at least as relates to any evaluations and disciplinary matters. That information was in turn forwarded to MPEA

for its response. To MPEA at least, all this material demonstrated continuing intimidating and coercive treatment of the WPPA president. All of the above is in the mind of the investigator in preparing this report.

Technology is also tied to the third unfair labor practice complaint. Prior to moving into its current building the WPD utilized a case tracking and reporting system the acronym for which is SWIFT. When transitioning into the new building the WPD also transitioned into a new comprehensive system also utilized by Flathead County, as well as the cities of Kalispell and Columbia. Replacing SWIFT was the New World Case Management, or "New World," a comprehensive system intended not only to address day to day reporting and case management utilizing devices such as daily logs and daily reports, but to also provide comprehensive law enforcement information reported to state and federal justice agencies as part of the National Incident Based Reporting System – NIBRS. The significance of New World is not only more efficient operation of law enforcement agencies, but accurate reporting of NIBRS (SWIFT also had NIBRS as part of its system) information is vital for eligibility for state and federal grants and appropriations.

As part of the implementation of New World, the City has trained WPD employees, bargaining unit and non-bargaining unit alike, in the operations of New World. Reporting systems have been established to ensure information is not only reported using New World, but also ensuring the information reported meets NIBRS standards and requirements. Like any new system New World is not without its problems and difficulties, and like any new system, users of the system adapt to its requirements on differing levels. IBR – Incident Based Reporting – errors have been of particular note and are at the basis of a disciplinary memo directed toward Officer Thornburg. IBR issues have occurred well before the WPD affiliated with MPEA, and they have continued post-affiliation as well.

The issues with IBR and Brandon Thornburg are well documented as are other performance related issues prior and subsequent to affiliation. As with other officers in the WPD, management has been responsible in the transition to New World recognizing that such transitions are often difficult. It is significant to note that Officer Thornburg's supervisor is Sergeant Clint Peters, a fellow member of the bargaining unit. It also seems of note that the transition for Officer Thornburg appears to have been particularly difficult. Ultimately issues with his failure to address IBR's resulted in Sergeant Peters orally requiring Officer Thornburg to submit a corrective action plan specifying how Officer Thornburg would address his errors. The plan was to be submitted by the end of the shift. No corrective action plan was submitted by Officer Thornburg, so Sergeant Peters issued a memo to Officer Thornburg on August 17, 2012 requiring Officer Thornburg to submit a corrective action plan by the end of Officer Thornburg's shift, Monday, August 20th at 06:00 hours. In the memo Sergeant Peters refers to Officer Thornburg's previous failure to submit an action plan as insubordination. Officer Thornburg complied with this memo, and it is this memo that MPEA contends is further evidence of disparate treatment directed at Officer Thornburg as a result of his leadership in affiliating the WPPA with MPEA.

Having thoroughly reviewed and considered all the information submitted by the parties and having met with WPPA members in person as well as being available by phone and e-mail, the investigator simply is not convinced that there is substantial evidence demonstrating a nexus between the affiliation of the WPPA with MPEA and the participation of Brandon Thornburg in accomplishing that affiliation. Further there been no substantial evidence either offered, or discovered by the investigator, indicating there was a pattern of interference, coercion or intimidation toward members of the bargaining unit or Brandon Thornburg specifically. There have been performance issues with Officer Thornburg to the point where they came to a head before a fellow bargaining unit member, Sergeant Peters, but the issues were not related to union activity. Simply put, the City has offered reasonable, well founded explanations that answer all the identified complaints by MPEA and in those answers, and in MPEA's response to the information provided by the City there is neither a demonstrated pattern of coercion, intimidation, or interference in union matters that would constitute an unfair labor practice charge.

III. Recommended Order

It is hereby recommended that Unfair Labor Practice Charges 3,5 and 6-2013 be dismissed.

DATED this 26th day of November 2012.

BOARD OF PERSONNEL APPEALS

By: _____

John Andrew
Investigator

NOTICE

Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss may be appealed to the Board. The appeal must be in writing and must be made within 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to dismiss becomes a final order of the Board.

* *

CERTIFICATE OF MAILING

I, _____ , do hereby certify that a true and correct copy of this document was mailed to the following on the _____ day of _____ 2012, postage paid and addressed as follows:

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